IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al*.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF(PJC)
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants	)	

DEFENDANTS' JOINT MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF TODD KING UNDER *DAUBERT v. MERRILL PHARMACEUTICALS, INC.* AND INCORPORATED BRIEF

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TABLE OF AUTHORITIES

Defendants respectfully request the Court to exclude the testimony of Plaintiffs' witness Todd King ("King") because his proposed testimony and opinions do not meet the admissibility requirements set forth in Federal Rule of Evidence 702 as interpreted and applied by the United States Supreme Court in *Daubert v. Merrill Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786 (1993) and subsequent cases.

I. THE PROPOSED TESTIMONY

King is Plaintiffs' proposed "remediation" expert. As such, he issued a report containing his opinions regarding what he believes to be necessary to "mitigate or correct" the alleged injuries that have been identified by some of Plaintiffs' other experts.[1] (*See Exhibit 1, King's report dated May 15, 2008.)* King's opinions can be categorized as follows: (1) opinions concerning remediation of Lake Tenkiller; (2) opinions concerning remediation of the Illinois River and streams in the Illinois River Watershed ("IRW"); (3) opinions concerning remediation of private water wells; (4) opinions concerning upgrades to municipal water treatment plants; (5) opinions related to the cost of cessation of the use of poultry litter as fertilizer; and (6) general opinions concerning causation and injuries.

King admits that he cannot offer a definitive opinion with regard to the remediation of Lake Tenkiller. Ex. 1, p. 166. Likewise, King cannot offer a definitive opinion with regard to the remediation of the Illinois River and the streams of the IRW. Ex. 1, p. 165. While King proposes that either 190 or 980 private wells need to be remediated or replaced, Ex. 1, p. 294-95, his

1 King did not make an independent determination that any of the alleged injuries exist; for purposes of his report he assumed that the injuries, in fact, existed, with one exception: nitrates in private well water. (Ex. 1, p. 47). King is the only one of Plaintiffs' expert witnesses who opines that there is any problem with nitrates in private wells. Ex. 1, p. 214, 280. As discussed in more detail later in this motion, King is not qualified to offer any opinions with regard to nitrates or their effect, if any, on human health.

opinion is fatally flawed and not based on reliable data. With regard to municipal water treatment plants, King opines that every single water treatment plant located in the IRW requires upgrading. Ex. 1, p. 193; Ex. 2, p. 31. Neither his opinion that the facilities need upgrading nor his opinion as to the costs of the upgrades is based on proper data. In addition, King's proposals are all based on the assumption that poultry litter will no longer be applied as fertilizer in the IRW. Ex. 1, pp. 55, 203; Ex. 2 p. 6, 10-11. He proposes to accomplish this by having all the poultry farmers take their litter to a landfill. Ex. 1, p. 203. However, he has not conducted any investigation to determine if that proposal is feasible. Ex. 1, p. 245.

In addition to the above, King's report includes gratuitous statements concerning causation and injuries, subjects on which he is not qualified to offer expert opinion testimony. None of his work has been peer reviewed, published, or subjected to any objective, external review outside of Plaintiffs' legal and expert team. As more fully explained below, King's opinions are not based on reliable data or methodology. Instead, his opinions are essentially plucked out of thin air.

II. THE LEGAL STANDARDS

A. The Federal Rules of Evidence

Before King can offer testimony at trial, his proffered testimony must comport with the Federal Rules of Evidence, and case law applying the Rules. Because King is being presented as an "expert," his testimony is subject to Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 702 has been elucidated by the United States Supreme Court in a series of cases beginning with *Daubert v. Merrill Dow Pharmaceuticals, Inc.,*[2] followed by *General Electric Co. v. Joiner,*[3] and *Kumho Tire Co., Ltd., v. Carmichael*.[4]

B. <u>The trial court must serve as a "gate-keeper."</u>

In *Daubert,* the United States Supreme Court emphasized the importance of the gate-keeping function of the trial court to serve as a check on the jury's inclination to give great (and sometimes inordinate) weight to the testimony of expert witnesses. By insuring that all expert testimony presented in a courtroom is based on a reliable methodology, district judges reduce the likelihood that verdicts will be based on passion and prejudice and thus help to ensure fair and just outcomes of litigation. One hundred years ago, Judge Learned Hand discussed at length the "serious practical difficulties" that arise from the use of expert witnesses.[5] Judge Hand noted that the use of experts frequently "confuses the jury" and the expert often "takes the jury's place if they believe him." *Id.* at 53.

The passage of time has not resolved these practical difficulties. The use of experts has vastly increased in recent years as issues involving science and technology have infiltrated nearly every area of litigation.[6] Difficulties arise because experts often deal with complex matters that

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[2] 509 U.S. 579, 113 S. Ct. 2786 (1993).

[3] 522 U.S. 137, 118 S. Ct. 512 (1997).

[4] 526 U.S. 137, 119 S. Ct. 1167 (1999).

[5] Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 50 (1901).

[6] C. Wright & V. Gold, Federal Practice and Procedure § 6262, at 181 (1997); see also *Joiner*, 522 U.S. at 149, 118 S. Ct. at 520 (Breyer, J. *concurring*).

are so esoteric jurors are frequently incapable of "critically evaluating the basis for an expert's testimony" and too often give "unquestioning deference to expert opinion." C. Wright & V. Gold, *supra*, § 6262, at 183. As the Supreme Court articulated in *Daubert*, expert testimony "can be both powerful and misleading." *Daubert*, 509 U.S. at 595.

The "traditional" means of pointing out weaknesses in testimony - cross-examination and the presentation of contrary evidence - is often lost on the jury. Jurors typically know little or nothing about the expert's area of expertise; hence the need for an expert. *See* Fed. R. Evid. 701; *see also* Hand, *supra*, at 54. Consequently, jurors easily miss subtle distinctions revealed on cross-examination and then drown in the untrue and the unproven. The difficulty that jurors have in evaluating technical evidence, combined with their natural tendency to defer to experts, makes the "gatekeeper" role of the trial court all the more critical.

As a gate-keeper, the trial court must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*." *Daubert*, 509 U.S. at 589. To properly perform its gatekeeping function, the trial court must exclude expert opinion testimony unless it meets a twofold test. First, it must be scientific knowledge: an assertion "derived by the scientific method" and supported by "appropriate validation." *Id.* at 590. Second, it must "assist the trier of fact," *Id.*, which means that there must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592. The gatekeeper analysis thus entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid* and whether it can be *properly applied* to the facts in issue. In reaching its conclusions regarding admissibility of the evidence, the trial court must consider that the "overarching subject [of a *Daubert* analysis] is the scientific validity – and thus the

evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Id.* at 594-95.

In this case, the key question is ***scientific validity***. Before a trial court can admit scientific testimony in the form of opinion, it must determine whether the methodology used by the proposed expert in reaching his opinion is *scientifically valid.* The Supreme Court set out several factors which bear on that inquiry, although none of the factors is solely determinative. A trial court should ask whether the proposed expert's theory can be (and has been) tested. *Id.* at 593. According to the Supreme Court, the testability of a theory is at the heart of whether something is truly science, or whether it involves some other field of human inquiry. *Id.* Another factor is whether the theory has been subjected to peer review and publication. "[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* at 593. A third factor is the known or potential rate of error, and the existence and maintenance of standards regarding a technique. *Id.* at 594. Finally, the Court ruled that the general acceptance of a theory or technique can also be a factor in determining whether the expert's testimony is admissible. *Id.* On this point the Court reasoned that a known theory or technique that attracts only minimal support within the scientific community may "properly be viewed with skepticism." *Id.* Throughout the analysis, the trial court's focus must be on the methodology, and not on the conclusions, of the proffered expert. *Id.* at 595.

The Supreme Court again addressed the *Daubert* gatekeeper role of the trial court in *General Electric Company v. Joiner,* 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed.2d 508 (1997). There, plaintiff alleged that exposure to PCBs had promoted his lung cancer. The trial court granted summary judgment to defendant, holding that plaintiff's expert's testimony that

plaintiff's lung cancer was linked to PCBs was no more than "*subjective belief or unsupported speculation*." 522 U.S. at 140 (emphasis added). The Eleventh Circuit reversed, but the Supreme Court reinstated the summary judgment for the defendant.

In reinstating summary judgment for the defendant, the Supreme Court stated that:

> nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. *Ipse dixit* is defined by Black's Law Dictionary as "He himself said it; a bare assertion resting on the authority of an individual." BLACKS' LAW DICTIONARY 743 (5th ed. 1979). Thus, the Supreme Court clearly endorsed the exclusion of any "expert conclusion" which is not logically or objectively derived from scientific data, but is rather a bare subjective belief or unsupported speculation of the witness.

The Supreme Court readdressed *Daubert* and the admission of expert opinion testimony in *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed.2d 238 (1999). In that case, the Court ruled that the gatekeeping obligation of the trial court, which requires an inquiry into both *relevance* and *reliability*, applies to all expert testimony. In short, the trial court is to make sure that an expert's testimony rests on a *"reliable foundation."* 119 S. Ct. at 1171. The Court stated that a trial court may also consider whether the expert's testimony holds together based on logic and common sense. Thus, the Supreme Court noted that the reliability of the testimony at issue in that case was suspect because the expert could not explain some aspects of his analysis, there were inconsistencies in his testimony, the expert did not adequately examine the pertinent physical evidence, and the expert was unable to answer

questions that should have been within his command if his other testimony was reliable. *Id.* at 1177-78.

III. KING'S OPINIONS DO NOT MEET *DAUBERT*'S REQUIREMENTS OF SCIENTIFIC VALIDITY OR RELIABILITY

A. King's own testimony reveals that his opinions are uncertain and not reliable

The Court does not have to look any further than King's own testimony to find that King's opinions do not measure up to the level of reliability and scientific certainty required by *Daubert*. He candidly admits that his analysis is full of numerous "data gaps" and that further analysis is necessary before he can render a definitive opinion. Ex. 1, p. 166. King's opinions are not grounded in scientific certainty but instead are nothing more than speculation as to things that *could* be done that *might* remedy Plaintiffs' alleged injuries. He admits that his analysis falls short of a feasibility study. Ex. 1, pp. 169-170, 179. The excuse he offers is that due to the "timeline the court imposed" he did not have time to finish his analysis. Ex. 1, p. 169. He has not continued to work toward finalizing his analysis to achieve reliable opinions and does not intend to do so. Ex. 1, pp. 169-70.[7] King admits that he has not computed the error rate of his estimates, but he guesses it would be "minus 30 [percent] and plus 50 percent." Ex. 1, p. 98. His guess is based on his experience and professional judgment. *Id.* He states that his cost calculations are not intended to be final, accurate numbers. *Id.*

In addition, King does not have the experience and training necessary to qualify him to render opinions concerning the remediation of the alleged injuries in this case. He has never worked on remediation of a watershed the size of the IRW. Ex. 1, p. 42. He has never worked on remediating *any* issues related to animal manure. Ex. 1, p. 42. He has no background with regard

7 Regardless, any such improper supplementation or bolstering of King's report would be properly excluded as untimely. *E.g., Cohlmia v. Ardent Health Servs., LLC*, 2008 U.S. Dist. LEXIS 65292, *18-19 (N.D. Okla. Aug. 22, 2008).

to runoff of nutrients from land application of poultry litter as alleged by Plaintiffs in this case. Ex. 1, p. 157. King does not know whether nitrogen or total phosphorus is a hazardous substance under CERCLA – he suspects not. Ex. 1, p. 185. Yet, he proposes that Defendants pay more than $1 billion dollars to remediate alleged injuries due to total phosphorus and nitrogen. Ex. 1, pp. 167-168.

Furthermore, he admits that he *cannot tell the fact finder whether the remediation measures he proposes will even be successful*. Ex. 1, pp. 186-87, 266. His proposals are nothing more than speculation and conjecture as to ways in which over $1 billion dollars could be spent that may or may not address the alleged injuries to the IRW.

In addition, King states that if poultry litter continues to be used as fertilizer in the IRW, then his proposals will not be successful. Ex. 1, p. 55, 203; Ex. 2 pp. 6, 10-11. Thus, unless the Court enters an order prohibiting the use of poultry litter as fertilizer, King's proposals are meaningless.

B. <u>King's opinions concerning remediation of Lake Tenkiller are uncertain.</u>

King's report lists four goals with respect to remediation of Lake Tenkiller. Ex. 2, p. 8. King did not make an independent evaluation as to whether Lake Tenkiller is in need of remediation, nor is he qualified to make any such determination; he assumes for the purposes of his report that remediation of Lake Tenkiller is necessary. Ex. 1, pp. 64-67. His report contains a list of possible alternative remediation measures. Ex. 2, pp. 17-21. However, King ultimately concludes that he cannot provide a recommendation for remediation of Lake Tenkiller because there are too many "data gaps." Ex. 1, p. 166.

Before expert opinion can be admitted at trial, *Daubert* requires that it be based on "scientific *knowledge*." *Daubert*, 590 U.S. at 589-90 (emphasis added). "Knowledge" connotes

more than subjective belief or unsupported speculation. *Id.* Because King cannot offer an opinion with regard to Lake Tenkiller that is anything other than speculation and conjecture, this Court should prohibit him from offering any opinions concerning remediation of Lake Tenkiller.

C. King's opinions concerning the remediation or replacement of private wells.

In considering a *Daubert* challenge, a district court should both examine the expert's theory and assess the reliability of the expert's application of a particular methodology to the data and facts of the particular case at hand. *State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip. Op. at 16-19 (10TH Cir. May 13, 2009). An "expert['s] conclusions are not immune from scrutiny: 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1205-06 (10th Cir. 2002) (quoting *General Elec. Co. v. Joiner,* 522 U.S. 136, 147 (1997)). Here, the inferences King draws from the data and his subsequent application of those inferences to the facts does not withstand scrutiny.

King opines that there are 190 to 980 private wells within the IRW that need to be repaired or replaced. Ex. 2, pp. 26-27. He estimates that the cost of repairing the wells ranges from approximately $2.2 million to $10 million. Ex. 2, Table 4. His estimate for the cost of replacing the wells ranges from approximately $5.8 million to $30 million. Ex. 2, Table 4. King's opinions with regard to the necessity of repairing or replacing private wells are not based on reliable scientific data. Instead, King's opinions are based on assumptions and suppositions that do not reflect reality.

One of Plaintiffs' consultants tested 60 private wells one time each. According to King, bacteria (total coliforms, not pathogens) were detected in 36 of the 60 wells, and 8 of the wells had an exceedance of nitrate. Ex. 2, p. 7. Based on that singular test, King *assumes* that the same

ratios apply to all the wells located in the Oklahoma portion of the IRW. Ex. 1, pp. 223, 269. In other words, since 60% of the 60 wells tested reflected a detection of coliforms once in one test, King assumes that 60% of the total wells in the Oklahoma portion of the IRW (878 wells) also contain detectable levels of bacteria. Ex. 2, p. 7. He employed similar simple arithmetic to arrive at the estimated number of wells he claims also have too much nitrate (190 wells). Ex. 2, p. 7.

King does not know the source of the bacteria or nitrate contained in the wells. Ex. 1, pp. 73-74. He merely assumes that the source is poultry litter. Ex. 1, p. 117. His sole source for that assumption is the "general practice of . . . poultry [litter] land application." Ex. 1, p. 118.

Based on his assumption that the source of bacteria is poultry litter and that it will remedy itself if poultry litter is no longer used as fertilizer,[8] he opines that if the use of poultry litter as fertilizer ceases, then 190 wells will need to be remediated or replaced (those that he assumes have too much nitrate). Ex. 1, p. 294. He states that if poultry litter continues to be used as fertilizer, then 980 wells will need to be remediated or replaced. Ex. 1, p. 295.

There are several problems with King's opinions concerning private wells. Significantly, he cannot state whether the 60 wells tested once by Plaintiffs are representative of the other wells in the Oklahoma portion of the IRW. Ex. 1, p. 297. Simply put, there is no scientific basis for assuming that the same ratios apply across the watershed. He admits in his report that his numbers reflect the "*potential*" number of wells in need of remediation, not the *actual* number of wells in need of remediation.[9] Ex. 1, p. 225. In addition, the error rate or confidence interval with regard to his estimate of the number of wells in need of remediation is unknown. Ex. 1, p. 296.

8 King bases this opinion on a single article that he read. Ex. 1, p. 281.
9 King also agrees that he would not advise a commercial client to replace a well based on only one test. Ex. 1, pp. 228-230.

Furthermore, King did not consider how many of the wells in the Oklahoma portion of the IRW are functional. Ex. 1, p. 225. Neither did he verify the percentage of the total wells that are not used for residential drinking water. *Id*. Thus, his estimate could easily include wells that are no longer used for residential drinking water or in use at all. *Id*. In addition, King admits that the reverse osmosis system he included in his estimate is nothing more than a water softener, which does not address health issues, only aesthetic issues. Ex. 1, pp. 111-112. Despite this limitation, King included the reverse osmosis system in his total costs for well remediation. Ex. 2, p. 27, Table 4.

King is the *only one* of Plaintiffs' team of experts who has offered any opinions concerning a nitrate problem. Ex. 1, pp. 214, 280. King has not conducted an investigation concerning the source of any nitrates and has no evidence that poultry litter is the source; instead he merely *assumes* poultry litter is the source. Ex. 1, p. 235. King is not a medical doctor nor is he an epidemiologist or toxicologist. Ex. 1, p. 277. Thus, he is not qualified to offer any opinions concerning issues with nitrate levels. Moreover, the standard he claims is exceeded does not even apply to private wells. Ex. 3.

As an alternative to repairing or replacing wells, King states that bottled water can be provided to the owners of the 190 or 980 wells at an annual cost of $1.4 million to $7.4 million. Ex. 2, p. 28, Table 5, Table 6. His calculation assumes 10 gallons of bottled water per person per day. Ex. 1, pp. 112-113. Rather than using the amount of water a person typically consumes in a day, King used the amount of water a person typically utilizes for all purposes, including cooking and washing. *Id*.

King's methodology is flawed. There is "too great of an analytical gap" between the data and the opinion offered by King. He took results from one test and extrapolated those results to

the entire watershed without any investigation of the validity of those results. He did not investigate whether the wells tested were representative of the rest of the wells in the watershed. He did not investigate whether the total number of wells he used in his calculations represents currently operational drinking water wells.

In forming their opinions it is not unusual for experts to extrapolate from existing data. However, neither *Daubert* nor the Federal Rules of Evidence contemplate or permit the introduction of testimony that is "connected to existing data only by the *ipse dixit* of the expert." *Joiner,* 522 U.S. at 146. A court may find that there is "simply too great an analytical gap between the data and the opinion proffered." *Id.* "Although it is not always a straightforward exercise to disaggregate method and conclusions, when the conclusion simply does not follow from the data, a district court is free to determine that an impermissible analytical gap exists between premises and conclusion." *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005) (*citations omitted*). The leap King makes from the data to his opinions is not supported by scientific methodology and sound reasoning. In short, his analysis and opinions are not scientifically valid but rather are simply conjecture and speculation. As such, they do not meet the reliability standards required by *Daubert* and should be excluded.

D. <u>King's opinions concerning buffer strips.</u>

King's proposal for remediating the surface waters of the Illinois River and streams in the IRW is to purchase land for buffer strips and plant vegetation thereon. Ex. 2, pp. 24-26. His estimate for the cost of obtaining buffer strips varies from $271 million to $956 million. Ex. 2, p. 26, Table 2, Table 3. He claims to have arrived at this amount by multiplying a purchase price by the total number of linear feet of stream banks, multiplied by 100 feet wide, throughout the entire

watershed for every stream.[10] However, rather than using the actual market price of land in the IRW for his calculation, King used the price $1,465 per acre (Ex. 2, Table 2, Table 3), which is the USDA average for agricultural land conservation easements across 19 states, not including either Arkansas or Oklahoma. Ex. 4. The $1,465 price per acre reflects the future value of development rights in areas of high development pressure in other parts of the country and is in no manner applicable to the five counties in the IRW at issue. *Id*. To the contrary, the average price per acre for marginal pastureland in the IRW ranges between $28 and $55 per acre. *Id.* Thus, King's figure is grossly overstated.

In addition, King cannot give an amount that is anything more than speculative because he does not know how many property owners would actually sell their property to Plaintiffs for the creation of buffer strips. Ex. 1, p. 168-69. King did not conduct any analysis to determine the amount of participation that could be achieved (Ex. 1, p. 169), despite his concession that a plan that is not implementable will fail. Ex. 1, p. 80. In addition, he did not take into account whether there are already buffer strips in place. Ex. 1, p. 201-202. Instead, his calculations are based on the blanket (and incorrect) assumption that there are zero buffer strips in the IRW. Likewise, King failed to consider which, if any, fields adjacent to proposed buffer strips are fertilized with poultry litter – he simply (incorrectly) assumed that litter is applied on all potentially impacted fields. Ex. 1, p. 246.

In addition to the purchase price of the buffer strips, King estimates a cost of $500 per acre per year for maintenance. Ex. 2, Table 2, table 3. However, King has no scientific basis for that opinion. When asked at his deposition for the source of that estimated amount, King could provide none and finally admitted "that's the best estimate I could come up with." (Ex. 1, p.

10 King's estimate for buffer strips on fields of only third order streams and above is $42 million capital cost, $8.6 million annual cost, for a project total of $150 million. Ex. 2, Table 3.

108). He also admitted that one could develop a more qualitative approach, but he has not done so. *Id*.

Again, the Court does not have to look any further than King's own candid testimony to find that his proffered opinions do not meet the reliability and scientific certainty standard required by *Daubert*. As with his opinions concerning the remediation of Lake Tenkiller, King cannot offer an opinion to assist the fact finder with regard to the purchase and maintenance of buffer strips because he cannot articulate a recommendation to the Court on this topic. Ex. 1, p. 165. He admits this is yet another area where there are too many "data gaps" for him to provide a reliable opinion. *Daubert* requires that expert opinions be reliable and grounded on sufficient data to support them. Clearly, when the expert himself admits that he cannot give a reliably certain opinion his testimony should be excluded.

E. <u>King's opinions concerning municipal water treatment facilities.</u>

King opines that all municipal water treatment facilities in the IRW need to be upgraded due to disinfection byproducts ("DBPs").[11] Ex. 1, p. 193; Ex. 2, p. 31. DBPs can occur as a result of disinfecting water for drinking purposes. King's opinion that all of the water treatment suppliers need upgraded plants is not based on any evidence of any issue with DBPs with these facilities. To the contrary, King bases his opinion on nothing other than the fact that the facilities obtain their water from the Illinois River or its tributaries. Ex. 1, p. 191.

King was provided a list of the municipal water suppliers in the IRW and simply calculated what it would cost to upgrade them *without any regard* for whether they needed upgrades, much less whether Defendants are responsible for any needed upgrades. Ex. 1, p. 193. He has not visited any of the utilities. Ex. 1, pp. 190-191. He has not spoken with any of the

11 King assumes for purposes of his report that issues exist with regard to DBPs; he did not make any independent determination. Ex. 1, p. 127-128.

operators of the utilities. Ex. 1, p. 246. He has not researched whether any of the utilities are violating permits with regard to DBPs. Ex. 1, p. 192. Indeed, he candidly admits that his remediation plan could include millions of dollars for upgrades to plants that have no violations. P. 192-93. For example, he estimates $82 million for upgrades to Tahlequah's facility despite the fact that Tahlequah has not had any violations of its permit with regard to DBPs. Ex. 1, p. 191. Moreover his statement that all the water treatment facilities need to be upgraded is based on rules and regulations that do not even apply to these facilities. Ex. 3. He admits that there is no certainty that the costs will be incurred; instead at best they could "potentially" be incurred. Ex. 1, pp. 131, 192.

King's opinion that all the water facilities must be upgraded is based on pure speculation and conjecture. His opinion is a prime example of the "*ipse dixit*" type of testimony the Supreme Court warned of in *Joiner*. Opinion testimony based on the "*ipse dixit*" of the expert instead of facts should be excluded. *Joiner*, 522 U.S. 146. Because there is nothing to support King's opinion other than the fact that "he himself said it," the Court should exclude his testimony.

Furthermore, King's calculations with regard to the costs of upgrading the water treatment facilities are erroneous. He arrived at his estimated costs by using a table from page 456 of the January 4, 2006, *Federal Register*. Ex. 2, pp. 30, 31. However, as explained by Michael McGuire in his expert report, King misapplied the data in the table. Ex. 3, excerpt of Michael McGuire Report dated January 26, 2009. King applied the costs as if they represent *unit* costs. However, the costs represent the *entire national compliance costs for all utilities in the United States that fall into that population category. Id*. The resulting exorbitant inflation of costs can be seen by comparing the $453 million King says it will cost for the 19 small water treatment plants in the IRW with the amount it costs across the entire United States, which is

$842 million. *Id*. Obviously, it cannot cost half as much to upgrade or operate 19 small water treatment plants in the IRW as it does to operate all water treatment plants in the entire United States. King's misapplication of the data renders his opinion completely and totally invalid. Because his opinion is not based on scientific certainty, it must be excluded under *Daubert*.

In addition to misapplying the national costs as unit costs, King also used the incorrect population categories for 4 of the utilities. Ex. 3. He also included in his estimate the cost to upgrade Cherokee County RWD #11. Ex. 1, p. 128; Ex. 2, Table 7; Ex. 3. However, this water district gets its drinking water from Tahlequah's treated water and does not incur any treatment costs. Ex. 3. These errors further demonstrate the lack of reliability of King's opinions. His opinions lack any scientific foundation whatsoever; they are nothing more than speculation and conjecture and must be excluded.

In addition to excluding King's testimony concerning DBPs because it is speculative and not reliable, this testimony should also be excluded because King is not qualified to opine on the topics of drinking water treatment or DBPs. His sole education regarding drinking water treatment processes was a one semester course. Ex. 1, p. 188. He has *no* education specific to disinfection byproduct formation. *Id*. He has never been hired to select remedial alternatives for DBPs prior to Plaintiffs hiring him for this case. *Id*. He has never been hired to design a drinking water plant. *Id*. He has never offered expert testimony concerning drinking water treatment processes. *Id*. He has never offered expert testimony concerning the formation or remediation of DBPs. *Id*. He has never written or published an article on the formation or remediation of DBPs. Ex. 1, p. 189. The only experience he has ever had with drinking water utilities was to develop training materials dealing with *security* issues, not *treatment* issues. Ex. 1, p. 190.

In summary, King has offered erroneous, unsupported opinions that he is not qualified to offer. Accordingly, King's opinions concerning upgrading water treatment facilities should be excluded.

F. King's opinion concerning litter landfills

As stated previously, King cannot state with any degree of scientific certainty that any of his remediation projects will be successful. However, according to King, they will definitely *not* be successful unless poultry litter is no longer used as fertilizer in the IRW. Ex. 2, p. 6, 10-11. His proposal is to have all the farmers take their poultry litter to landfills. He estimates that at a cost of $16.1 million annually to haul litter to a landfill. Ex. 2, Table 1. However, as with his other opinions, King has not conducted an investigation to determine whether his proposed project is feasible. He has made no determination that poultry farmers would actually take their litter to a landfill. Ex. 1, p. 203. He has made no determination as to whether any landfill would even accept poultry litter. Ex. 1, p. 245. King simply *assumed* that *if* all the farmers take their litter to a landfill and *if* the cost is $35 per ton, then the total cost of land-filling poultry litter would be $16 million.[12] All he really did was apply basic arithmetic to his assumptions – something that does not require expert opinion. *U.S. v. Rodriguez*-Felix, 450 F.3d 1117 (10th Cir. 2006) (information within jury's common knowledge and experience not proper subject of expert testimony); *Hayes v. Wal-Mart Stores,* 294 F. Supp. 2d 1249 (E.D. Ok. 2003) ("When normal experiences and qualifications of layman jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper."). Because King did not conduct any investigation of whether the project is feasible, his opinion does not withstand scrutiny under *Daubert* and should be excluded.

12 King includes a 30% contingency in all of his cost estimates. Ex. 1, pp. 97-98.

G. King's opinions concerning causation and injuries

Throughout his expert report and in his deposition, King offers opinions concerning causation and damages for which he is not qualified. For instance, he opines that "[t]he IRW, its rivers and streams, and Lake Tenkiller have been impacted by the over application of poultry waste to land within the states of Arkansas and Oklahoma." Ex. 1, p. 6. King also asserts opinions concerning bacteria and related human health concerns. Ex. 2, pp. 4, 6, 7, 26. King has not conducted any investigation into the injuries Plaintiffs allege. Instead, he relies on the opinions of Plaintiffs' other expert witnesses. Ex. 1, p. 47. Moreover, King is not qualified to offer opinions concerning causation or Plaintiffs' alleged injuries. He is not an expert in the fields of toxicology, epidemiology, water treatment systems, DBPs, fisheries, water quality, or soils. King is simply parroting what Plaintiffs' other witnesses have stated in their reports.

Experts may offer opinions on issues of "scientific, technical or other specialized knowledge" only if it will "assist the trier of fact to understand the evidence or determine a fact at issue." Fed. R. Evid. 702. Even if proposed testimony is admissible under Rule 702, the Court should exclude it under Rule 403 if the probative value is substantially outweighed by its potential to confuse or mislead the jury, or if the testimony is cumulative or needlessly time consuming. *E.g., Bowoto v. ChevronTexaco Corp.*, 2006 U.S. Dist. LEXIS 41776, at *7 (N.D. Cal. June 9, 2006) (citing *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991).

Courts generally exclude expert testimony that repeats or parrots the testimony of other experts on the grounds that it is unduly confusing, misleading, or repetitive. Cumulative expert testimony presents a danger that jurors will give the repetition undue weight because of its special "expert" status. *E.g., Hendrix v. Evenflo Co.*, 2009 U.S. Dist. LEXIS 6198, at *19 (N.D.

Fla. Jan. 28, 2009); *see also Daubert v. Merrel Dow Pharm.*, 509 U.S. 579, 595 (1993) (expressing concern over the potential misleading effect of expert testimony).

Expert opinions that "merely recite facts, or endorse opinions, expressed" by other experts are also inadmissible under Rules 702 and 403 because such opinions are "cumulative and certain to waste time." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 550 (S.D.N.Y. 2004). In *Rezulin*, the MDL court specifically found that repetition of another expert's **opinion** does not amount to a proper background or foundation for a second expert and is subject to Rule 403 exclusion. *Id.* (emphasis in original); *accord Thorndike v. Daimler-Chrysler Corp.*, 266 F. Supp. 2d 172, 185-86 (D. Me. 2003) (excluding "unnecessarily duplicative" expert testimony that covered "territories already occupied" by the party's other experts). As the Ninth Circuit noted in upholding the exclusion of a cumulative expert's testimony, "a party is not entitled to have an expert testify solely because that witness can eloquently summarize the evidence. That job belongs to counsel." *Rogers*, 922 F.2d at 1431. Such "endorsing" opinions are inadmissible. *See id.; In re Rezulin*, 309 F. Supp. 2d at 550.

In addition to being potentially misleading and wasteful of time and resources, duplicative expert testimony is not helpful and thus not admissible under Rule 702. Such testimony describes "lay matters which a jury is capable of understanding and deciding without the [parroting] expert's help" – that is, the jurors can understand the original opinion itself and do not need one testifying expert to explain and repeat another testifying expert's opinion. *In re Rezulin*, 309 F. Supp. 2d at 546; *see also Bowoto*, 2006 U.S. Dist. LEXIS 41776, at *13-14 (noting that an expert may not "parrot" the opinion of another) (*citing Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002)). Numerous courts have found the opinions of "parroting" experts are inadmissible. *See, e.g., Robinson v. Ford Motor Co.*, 967 F. Supp.

482, 487 n.2 (M.D. Ala. 1997) ("An opinion .. .which simply parrots the opinion of another does not assist the trier of fact, and thus, is inadmissible ….").

Relatedly, "[e]xpert testimony may not appropriately be used to buttress credibility" of any witness. *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988) (overruled in part on other grounds by *United States v. Morales*, 108 F.3d 1031, 1033 (9th Cir. 1997)). Rather, "[i]t is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience. This is an area in which jurors did not need additional assistance." *Id.* (internal quotations omitted).

King is not qualified to offer general causation and injury opinions. Moreover, he has not conducted any investigation into these topics to support any opinions. His testimony on causation and injuries is merely to repeat what Plaintiffs' other experts have stated in their reports and deposition. Such testimony by King should not be permitted because it is not supported by a reliable scientific foundation as required by *Daubert;* it will not assist the fact finder in any manner; it is cumulative; and it has the potential to mislead or confuse the jury.

V. CONCLUSION

None of the opinions offered by King meet the reliability standards required by *Daubert*. King did not conduct any investigation. King is offering opinions in areas in which he is not qualified. There is no scientific connection between the data and King's opinions. King himself admits that his opinions are "tentative" and that he cannot offer the Court a reasonably certain opinion on many of the topics contained in his report and testimony. In short, King's testimony is nothing but speculation and conjecture. Accordingly, Defendants respectfully request this Court to exclude King's testimony.

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